IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS GLASS,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

Brief of Wisconsin Employment Relations Board In Opposition To Petition For Rehearing

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I.

THE OPINION OF THE COURT IS CONSONANT WITH THE FINDINGS OF THE WISCONSIN BOARD AND THE STATEMENTS OF THE WISCONSIN COURT RESPECTING THE OBJECTIVE OF THE PETITIONERS' COERCIVE PROGRAM. THE ABSENCE OF DEFINITELY ASCERTAINABLE OBJECTIVES WAS MERELY ONE OF THE INCIDENTAL ASPECTS OF THE PROGRAM AND NOT THE SOLE CONSIDERATION OF THE DECISION (In reply to pp. 1 to 6 of Petition for Rehearing)

It is with some reluctance that we enter upon a discussion of the petitioners' challenge to the court's statement that the employer "was not informed * * * of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them"—but that reluctance does not result from the smallest doubt of the accuracy of the court's summation. It stems rather from a preference not to give to a passing consideration the emphasis accorded to a major issue. The statement was included as one of a number of incidents descriptive of the procedure and has the same status as other descriptive items such as the circumstance that the stratagem was "without warning to the employer or notice as to when or whether the employees would return," that it "was repeated on 26 occasions," and that it consisted of "calling repeated special meetings of the union." Each portion of the descriptive material is correct in isolation, but perhaps no one item would in itself be decisive of the case.

The absence of specific demands was discussed in the respondent board's brief because it was that circumstance

which made impossible an evaluation of the conduct on the basis of its objective and made necessary an analysis of the tactics on other grounds. It is a tenet of the common law that concerted coercive action is indefensible (as well as being an unfair practice under sec. 111.06 (2) (b), Wisconsin Statutes) when it has an improper or unlawful objective. See for instance, Restatement Law of Torts, sec. 794 et seq. Had the objective of the action here involved been sufficiently definite so as to make possible an evaluation of its legality the case might have ended there, because it is generally recognized that *any* coercive action, regardless of whether otherwise proper, is indefensible if undertaken in support of a wrongful objective.

The state board found that the stratagem was adopted to enforce demands of the petitioners, and no one connected with the case is so naive as to argue otherwise. The significant thing about the board's findings in that respect is its omission to specify *what* demands were to be so enforced. Surely the nature of the demand would have been discussed if it could have been ascertained because of the laws seeking to prevent coercion for improper objectives.

Words similar to those of the United States Supreme Court were used by the Wisconsin Supreme Court when the latter said "No demand was made upon the company that any or a succession of walkouts would be engaged in unless the company conceded to the terms of the new contract as proposed by the union" (R. 107).

For the first time in the petition for rehearing, it is suggested that the employer was aware it could avoid the stoppages by compliance with a directive of a Regional War Labor Board. There is no evidence in the record to that

effect; and such a result can surely not be reached by implication when the petitioners had themselves appealed from a directive of the Regional Board on September 11, 1945, prior to the commencement of the coercive program here under discussion (R. 34).

In the light of the unchallenged evidence that many varying and inconsistent reasons were given to the employer for the petitioners' conduct (R. 36, 37, 39, 48, 49), that new demands were being made (R. 35), and that the petitioners disavowed even at the hearing that the purpose of the program included certain demands previously made upon the employer and pressed before the War Labor Board (R. 48), we submit that the statement of this court to which the petitioners object is not only warranted but unavoidable.

The exact objectives of the petitioners were not only uncommunicated to the company but had indeed not been finally settled upon by themselves.

II.

FEDERAL COURTS HAVE HELD COERCIVE ACTIVITIES SIMILAR TO THOSE HERE INVOLVED TO BE CONTRARY TO THE SPIRIT OF THE FEDERAL LAW; AND THE NATIONAL LABOR RELATIONS BOARD HAS NEVER HELD SUCH A PROGRAM AS IS HERE INVOLVED TO BE PROTECTED BY SUCH LAW (In reply to pp. 6 to 11 of Petition for Rehearing)

The petitioners urge a distinction between this case and cases such as *C. G Conn Limited v. National Labor Relations Board,* (1939) 108 F. 2d 390; *Home Beneficial Life Ins. Co. v. National Labor Rel. Bd.,* (1947) 159 F. 2d 280 and *National Labor Relations Bd. v. Montgomery Ward & Co.,* (1946) 157 F. 2d 486, apparently on the ground that those cases are inapplicable if the court was in error in this case in stating that the employer was not informed "of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them." It would seem to us that if error had been made in that respect the instant case would be exactly identical with the ones cited, because in those cases there was no uncertainty with respect to objective. The unwillingness of the petitioners to be committed to a specific objective in the instant case may, perhaps, make the tactics less defensible than those involved in the cases cited; but the reliance placed by the court upon those cases illustrates that the primary basis of the decision was that the petitioners "did not stop work" (in the words of the petitioners from page 7 of their petition for rehearing) but rather "sought and intended to continue work upon their own notion of the terms that should prevail." As pointed out

in *National Labor Relations Bd. v. Montgomery Ward & Co.*, (1946) 157 F. 2d 486, 496:

> "It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardful of the interests of the employer during the term of their service, and carefully discharge their duties to the extent reasonably required. 35 Am. Jur. p. 514. * * * While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work. C. G. Conn, Ltd. v. N. L. R. B., 7 Cir., 108 F. 2d 390; N. L. R. B. v. Condenser Corp., 3 Cir., 128 F. 2d 67; N. L. R. B. v. Mt. Clemens Pottery Co., 6 Cir., 147 F. 2d 262."

The individual contract of hiring under which each employee agrees to conform to certain rules in return for being employed is not eliminated by collective bargaining. *J. I. Case Co. v. National Labor Relations Board*, (1944) 321 U. S. 332, 88 L. ed. 762, 64 S. Ct. 576. The strike as ordinarily conducted does not violate such employment contract because it involves an actual quitting of work and so either a termination or suspension of the contract of employment. The distinction between cases involving the usual form of strike and the situation involved in *C. G. Conn Limited v. National Labor Relations Board*, (1939) 108 F. 2d 390, *Home Beneficial Life Ins. Co. v. National*

Labor Rel. Bd., (1947) 159 F. 2d 280, *National Labor Relations Bd. v. Montgomery Ward & Co.*, (1946) 157 F. 2d 486, and the instant case, is that the tactics involved in the latter group do not seek to suspend the contract even temporarily but to retain all its benefits without obligation to carry out its provisions, and that is what was condemned by the Circuit Courts of Appeals in the foregoing cases as an attempt to continue work on terms fixed unilaterally. Such attempt violates the contract of employment under which the violators seek at the same time to hold the other party obligated.

Even the ordinary strike is generally recognized as illegal when it is in breach of a contract. See 1 Teller, Labor Disputes and Collective Bargaining, sec. 86. This principle is recognized even in the case cited in support of the petition for rehearing at page 10, i.e., *National Labor Relations Board v. Kalamazoo Stationery Company*, (1947) 160 F. 2d 465 (C. C. A. 6), where the court recognized that activities in violation of an employment contract are not activities protected by federal legislation. It said: "We recognize the right of the employer to discharge employes who strike in violation of their contractual obligations with the employer * * *."

It seems, perhaps, superfluous to discuss early decisions of the National Labor Relations Board which have already been analyzed by this court when, even if they sustained the petitioners' position, they would have been superseded by the many later decisions of the Circuit Courts of Appeal. It is interesting to note, however, that even in the case of *Matter of the Cudahy Packing Co.*, 29 N. L. R. B. 37 cited at page 9 of the petition for rehearing, the National Board pointed out that a few brief work cessations of from 10 to 20 minutes each had not interfered with production or

caused the employer any loss because the employees "appeared to have completed the killing of the scheduled number of animals that day"; and so there was in substance no violation of the employment contract.

We have here the exact situation which was described in the *Conn case*, where it is sought not to terminate nor suspend the contract; but to hold the opposite party to all its obligations and to perform on their own side only upon terms prescribed by themselves. It is a situation in which the petitioners "sought and intended to continue work upon their own notion of the terms which should prevail." The right to insist upon all the benefits of a contract and at the same time to refuse to perform it is not one which is protected either by the constitution or by legislation, regardless of whether the objectives sought to be obtained by such conduct are stated or unstated.

III.

PETITIONERS HAVE FAILED TO GRASP THE COURT'S ANALYSIS OF THE NATIONAL BOARD'S ORDERS PROHIBITING DISCIPLINARY ACTION BY EMPLOYERS IN CERTAIN CASES (In reply to pp. 11 to 13 of Petition for Rehearing)

We feel that the petitioners' distortion of the court's analysis of the National Board orders should not pass unchallenged even though, as the court has pointed out, administrative interpretation is in any event governed by judicial interpretation and superseded by the latter so far as inconsistent.

Federal legislation protects certain lawful activities against interference by an employer. In applying the act and extending the protection afforded by it, the National Board is faced with the necessity of finding motivation for the employer's action in each case. The law does not purport to interfere with the exercise of discipline by an employer except where such discipline is engaged *for the purpose* of encouraging or discouraging employes in such activities. In determining the motivation for the employer's discipline, surely it is permissible for the board to weigh the severity of the discipline against the seriousness of the act for which it is purportedly imposed. If an employer imposes the severest form of discipline, by discharge, for a comparatively innocuous offense, then the board is warranted in drawing the factual inference that the employer's conduct is for the purpose of interfering with concerted activities rather than for the purpose of preserving necessary discipline.

IV.

THE TYPE OF COERCIVE ACTION INVOLVED IN THIS CASE IS NOT GUARANTEED BY FEDERAL LEGISLATION AGAINST EMPLOYER INTERFERENCE OR OTHERWISE (In reply to pp. 13 to 19 of Petition for Rehearing)

The disputation under Heading IV of the petition for rehearing is primarily repetition of material upon the main issue in controversy, which was argued, briefed and considered at great length in the original hearing. The petitioners unnecessarily reiterate their argument that under

the rule of *Hill v. State of Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782, state action may not nullify rights guaranteed by federal law, because the court has recognized and followed that principle in this case. The primary issue is whether Congress ever intended to place beyond regulation the type of tactic invented by the petitioners.

Even if we adopt as our sole yardstick the test set out by the petitioners at page 8 of their petition for rehearing, that would of itself necessitate a ruling that the newly devised tactic is *not* beyond control. The petitioners have said that the same test is to be applied to concerted action as to individual action. If the action of an individual may not be regulated, they say, then the action of a group of individuals in doing the same thing is immune from regulation. We believe that no individual has an inalienable right, emanating either from the constitution or Congressional action, to violate his contract and at the same time insist that the other party to the contract be held to all his obligations under it. Such conduct of an individual surely might be regulated without infringement of his constitutional rights; and *a fortiori* the same conduct by many individuals can be so regulated. The only reason why there is little or no concern for the regulation of conduct by an individual is because it has little impact upon the public welfare; but when the impact is multiplied by concert of action, it may become a matter of public concern. Even if it be true that the enhancement of a problem by concert of action does not of itself affect constitutional tests, it surely may be conceded that such enhancement may remove the problem from a matter of small concern to one of public concern. (The issue is not altered by the petitioners' in-

sistence that the regulation is for the protection of the employer rather than the public. If the regulation were not designed to protect the public interest, it would have been stricken down in state courts.) Likewise regulation dealing with coercion is dependent upon the fact of coercion in an individual case; and that may be shown by the intent and effect of concerted action where it might not be present in the case of isolated action by an individual.

We believe that neither individually nor in concert does one have an inalienable right to violate his agreement while he insists upon a continuation of that agreement.

V.

THE COURT DID NOT ERR IN HOLDING THAT THE NATIONAL BOARD MAY NOT APPROVE A PRACTICE WHICH THE COURTS HAVE HELD CONGRESS DID NOT INTEND TO PROTECT (In reply to pp. 19 to 21 of Petition for Rehearing)

Without intending to minimize the great powers and discretion which have rightly been conferred upon the National Labor Relations Board, it still must be borne in mind that the board is an administrative agency subject to whatever circumscription Congress sees fit to provide; and that such limitations are to be determined by the judiciary. While administrative interpretations of the board undoubtedly do carry great weight with the courts, they could not be binding upon the courts. It is the judicial interpretations which govern the administrative branch and not the reverse.

The petitioners seem to urge as ground for rehearing that courts have no right to consider a question of statutory interpretation but that it must be left to the administrative agency. If that be not a correct representation of their position, their petition leaves little room for doubt that they do object to the question having reached this court in the manner in which it did. While state action appears to be in disrepute with the petitioners in the instant case, the same animus may be transferred to federal control in another case. We see no ground for the apparent assumption that state action must be anti-social and state courts unwise and unjust. The federal government has not yet seen fit to preclude consideration of federal questions in state courts so long as the parties are safeguarded by adequate means of review. If it were deemed that such matters could not be considered in state courts, the federal judicial code would doubtless provide for mandatory removal in all such cases. It has been deemed that justice will be best served by permitting parties to have disputes between them adjudicated by the most convenient means and in the most convenient forum. The fact that a question is adjudicated through one forum rather than another should not preclude the ultimate determination of the question involved so long as all parties were accorded their full rights to be heard in the process. The Supreme Court of the United States is the final authority to adjudicate the questions here raised, and presumably its adjudication would be the same regardless of the route via which the question reached it.

The employer is criticized for not having closed its plant and throwing 2,000 employees out of work so as to invite an unfair practice procedure before the National

Board, in order to determine a question which has here been determined with an avoidance of the industrial strife which both federal and state legislation by their own declarations seek to prevent. If the petitioners' contentions were true that their new coercive tactics are affirmatively guaranteed by federal legislation, it would unquestionably be an unfair practice for an employer to engage in a lockout as the petitioners assert it should have done; because surely such a lockout would be an "interference" with those rights and any interference with guaranteed rights is an unfair practice. It is the stated purpose of the federal legislation to *prevent* unfair practices.

Surely no substantial rights have been injured because the questions involved have been adjudicated through the courts instead of by the route of a lockout of 2,000 employees, when the ultimate objective in either case is to obtain the decision of the highest forum in the land upon all of the legal issues which are or could be involved, no matter how the case had reached it.

VI.

THIS COURT DEFINED THE AREA FOR STATE ACTION IN THE MANNER BEST CONCEIVED TO CARRY OUT THE WILL OF CONGRESS AND TO PROMOTE THE PUBLIC WELFARE (In reply to brief Amicus Curiae Congress of Industrial Organizations).

The brief of *amicus curiae* Congress of Industrial Organizations, has twice indicted the court for "a complete misapprehension" of the scope and operation of the National Labor Relations Act. The gist of the argument ap-

pears to be that there *should* not be left to states any power at all to enter the field of industrial conflict—no matter how tremendous may be its impact upon local welfare—except to punish or prevent breaches of the peace. (We will not here dwell long upon the point heretofore argued, that we believe the action here taken by the state falls within even that limited field, but surely an insistence upon retaining and at the same time violating a contract relation freely undertaken comes close to, if not within, the field of breaching the peace in the same manner as does a sitdown strike.)

In furtherance of their arguments, it is suggested that it has "always" been the understanding of labor organizations that the right to strike (and the scope of the argument makes no distinction as to lawful or unlawful strike) was protected against interference, "whether by the states or by private employers"; and that recognition of any right by states to regulate constitutes "utter chaos." Whatever understanding there has "always" been about the extent of protection accorded strikes by section 7 of the National Labor Relations Act, it could in no event have been of longer standing than the dozen years which have elapsed since the decision of the case of *National Labor Relations Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 in 1937. Before that there had been a substantial doubt of the power of Congress to enter the field. Until that time, regulation of labor relations had been primarily handled by states; and surely if *unrestricted* regulation by states did not result in "utter chaos" the strictly circumscribed regulation permissible under the decision of this court will not have such result.

It seems clear enough to us that the court has said that

states may continue to regulate in the manner which would otherwise be permissible under their police power to the extent that they do not impair rights guaranteed by Congress and do not undertake a function entrusted by Congress exclusively to a federal agency.

Legal pronouncements are rarely susceptible of absolute predictability in boundary line cases; but the yardstick supplied in this case seems to us as definite as any of the rules heretofore adopted relative to respective federal and state jurisdiction.

The primary burden of the argument of *amicus curiae* appears to be that, even if Congress *has* left room for state action, it should not have done so. We will not endeavor here to marshal the very potent arguments against such an assertion because we believe that it is an argument more properly addressed to Congress—which could, if it chose, and perhaps will, enact a law clearly manifesting its intention "to exclude states from asserting their police power." To the present time, Congress has indicated its satisfaction with the court's conclusion that it has "designedly left open an area for state control."

In the brief of *amicus curiae*, diametrically opposite positions are taken for the apparent purpose of creating a dilemma under which the state action must be held invalid. First it is said that the regulated conduct is guaranteed by federal legislation and is immune from regulation of any kind. In an abrupt about-face it is then said that the conduct is unlawful under the federal act and so it cannot be prevented by the state.

Following the latter argument to its logical conclusion would necessarily contradict the concession of *amicus curiae* that states may punish or prevent breaches of the peace;

because the National Board might conceivably find that such breaches of the peace were unfair practices under the provisions of the federal law relating to refusal to bargain. Congress did not intend to remove from state control conduct which is inimical to the local public welfare when considered independently, merely because such conduct might also be a part of a pattern which would establish an entirely different offense under federal law.

The first horn of the dilemma which *amicus curiae* seeks to create—that the conduct in this case is guaranteed by Congress from any interference at all—has been discussed under preceding headings but we would like to note our belief that it is not the court but the court's friend which is under a "complete misapprehension" of the scope of the National Labor Relations Act. Such misapprehension is revealed by arguments urging, in effect, that it is the primary purpose of the act to encourage and place beyond control all work stoppages without regard to tactics or objectives. Such a contention belies the very words of the Congress which asserted that its primary purpose was to prevent "strikes and other forms of industrial unrest" by substituting other types of concerted activities looking toward amicable adjustment of difficulties so as not to impinge upon the public welfare. Coercive action was sought to be discouraged rather than to be given a status superior to any which it had ever previously enjoyed. The purpose of the law to prevent industrial friction was what made it necessary to announce a rule of construction that the preventive plan did not go so far as to interfere with the right to "strike" as theretofore recognized—that is to engage in a strike lawful both in method and purpose. The law of Wisconsin likewise expressly guarantees that right (see

sec. 111.15). At the same time that Congress expressly provided its rule of construction that its scheme for prevention of industrial conflict should not be construed to interfere with the right to strike, it provided an express rule of construction that it should not "affect the limitations or qualifications" on that right. The exercise of such a coercive weapon has always been qualified, and still is, by the necessity for both proper method and proper objectives.

Respectfully submitted,

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